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LATHAM &amp; WATKINS LLP

February 3, 2023

VIA ECF

The Honorable Colleen McMahon  
U.S. District Court for the Southern District of New York  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street, Room 2550  
New York, NY 10007

Re: *In re Omnicom Group Inc. ERISA Litigation*, No. 1:20-cv-04141  
Joint Letter Motion to Seal Pre-Trial Filings

Dear Judge McMahon:

We represent Defendants and are writing on behalf of the parties pursuant to the Court's Individual Practices to request permission to file under seal certain of the documents filed by the Parties today in advance of trial in this matter. Consistent with Defendants' prior filings under seal that have been permitted, these filings contain the following three categories of confidential information:

- (i) information protected by the attorney-client privilege that is subject to the ERISA fiduciary exception and therefore was produced to plan participants but should be protected from disclosure to the general public, *see Leber v. Citigroup 401(K) Plan Inv. Comm.*, 2015 WL 6437475, at \*1 (S.D.N.Y. Oct. 16, 2015);
- (ii) proprietary information contained in presentations by Plan adviser Mercer to the Administrative Committee, *see In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997); and
- (iii) competitively sensitive pricing information and bids from five recordkeepers obtained during the RFP that the Administrative Committee conducted with the assistance of Mercer, *see Kewazinga Corp. v. Microsoft Corp.*, 2021 WL 1222122, at \*6 (S.D.N.Y. Mar. 31, 2021); *Skyline Steel, LLC v. PilePro, LLC*, 101 F. Supp. 3d 394, 412-13 (S.D.N.Y. 2015).

Defendants understand that much of this information will become public once trial commences on February 22, 2023. However, to meet the February 3, 2023 filing deadline for pre-trial submissions and to provide an opportunity for the parties and non-party Mercer to be heard

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(2) I don't need any more briefs - file redacted version

MEMO ENDORSED

for vesting publicly and unredacted under seal.

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regarding confidentiality at trial, the parties are jointly seeking leave to file, for the time being, the documents listed below fully under seal, at least until the start of trial<sup>1</sup>:

- Expert Declaration of Russell Wermers
- Expert Declaration of Steven Gissiner
- Expert Declaration of Eileen A. Kamerick
- Declaration of Philip J. Angelastro
- Declaration of Brad Nodiff
- Declaration of Leslie Chiocco
- Declaration of Brian Roberts
- Declaration of David Hyman
- Declaration of Amy Reynolds
- Declaration of Denis Streiff
- Declaration of Robert J. Lorfink
- Declaration of Mark Bokert
- Defendants' Proposed Findings of Fact and Conclusions of Law
- Plaintiffs' Proposed Findings of Fact and Conclusions of Law
- Plaintiffs' Expert Declaration of Michael Geist

With respect to the use of these documents at trial, the parties respectfully request the Court's guidance. One way of addressing the confidentiality issue would be for the parties to submit redacted copies of the documents this coming week, consistent with the Court's Individual Rules and Practices, the Court's addendum to the parties Stipulated Protective Order (ECF No. 67), and in light of the Court's October 24, 2022 Order (ECF No. 155). Alternatively, if the Court wishes to consider whether the categories of information set forth above can be maintained as confidential at trial, any parties or non-parties could submit briefing on that topic and the parties could then provide redacted copies consistent with any decision the Court makes. Defendants have

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<sup>1</sup> The parties are not requesting to seal Plaintiffs' Expert Declaration of W. Scott Simon and Plaintiffs' Expert Gerald W. Buetow.



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conferred with Plaintiffs who agree with the relief sought in this motion but take no position with respect to the assertions of confidentiality.

Defendants will, of course, promptly deliver to the Court unredacted copies of all filings. The parties also are conferring regarding a schedule for delivering the exhibit binders the Court requested in the Court's January 26, 2023 letter.

We appreciate the Court's consideration of this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Jeff G. Hammel", is written over a horizontal line.

Jeff G. Hammel  
of LATHAM & WATKINS LLP

cc: All Counsel of Record (via ECF)